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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 502

AMERICAN & EUROPEAN AGENCIES, INC., *Petitioner*

v.

WHITNEY GILLILLAND, PEARL CARTER PACE, AND HENRY J. CLAY, constituting the Foreign Claims Settlement Commission of the United States

and

GEORGE M. HUMPHREY, as the Secretary of the Treasury, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on June 27, 1957.

OPINION BELOW

The Memorandum and Order was filed in the District Court on May 28, 1956 (R. 101-102). The opinion of the Court of Appeals (App. 1a-11a) is not yet officially reported; both are printed as an appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1957 (R. 118). The jurisdiction of this Court is invoked under Section 1251(1) of the Judicial Code (28 U.S.C. 1254(1)).

QUESTION PRESENTED

Does Section 4(h) of the International Claims Settlement Act of 1949 (22 U.S.C. 1623(h)), which declares that all decisions of the Foreign Claims Settlement Commission shall be "final and conclusive in all questions of law and fact and not subject to review. . . . by any court by mandamus or otherwise," bar judicial intervention by a court of competent jurisdiction to require the Commission to grant the hearing to which the Petitioner is entitled by the statute, when the Commission has refused Petitioner such hearing?

STATEMENT

On July 18, 1948, the United States and Yugoslavia executed an agreement whereby the Secretary of the Treasury unblocked certain Yugoslav assets in the United States, and Yugoslavia, on August 21, 1948, paid $17,000,000 therefrom into the United States Treasury, in full settlement and discharge of all claims of the United States and of its nationals for property which had been nationalized or otherwise taken by Yugoslavia. This deposit by Yugoslavia was for the

sole purpose of distributing the funds among the claimants, and the United States was to have no proprietary interest in the funds provided except as one of the claimants. If any balance remained after the adjudication of all claims, that balance was to be returned to Yugoslavia. All costs of adjudication of the claims was to be charged against the fund.

To implement this agreement, Congress enacted the International Claims Settlement Act of 1949, as amended (22 U.S.C. 1621, et seq.) (hereinafter referred to as the "Act"). This Act established the International Claims Commission (redesignated the Foreign Claims Settlement Commission in Reorganization Plan No. 1 of 1954, and hereinafter referred to as the "Commission") to receive, examine and render final decisions with respect to the noted claims, and provides, *inter alia* (Section 4(h)) (App. 11a):

> "Any claimant whose claim is denied, or approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claims".

Section 4(j) of the Act provides that the Administrative Procedure Act shall be applicable to proceedings before the Commission. (App. 12a) Section 7(c) (5 U.S.C. 1006(c)) of the Administrative Procedure Act provides that every party to a hearing has a right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. (App. 12a)

The Commisison issued Rules of Practice and Procedure which provide, *inter alia,* that: (22 C.F.R. 300.6(a))

> "Hearings, whether upon the Commission's own motion or upon request of claimant, shall be held upon ten days' notice of the time and place thereof and the questions to which limited. . . ." (App. 12a)

The Petitioner, a New York corporation, filed its claim with the Commission for $1,538,753.22. It proved that it was the owner of 12,326 shares, constituting 61.6% of the outstanding capital stock of Falersa, S.A., an Italian Corporation. Falersa owned an industrial plant in Yugoslavia which was taken by that country. The Petitioner from time to time furnished such documentary evidence as the Commission required in support and explanation of its claim.

On November 29, 1954, a little more than a month before the Commission's affairs with respect to the Yugoslav claims were to be completed, the Commission issued a Proposed Decision (R. 13-30) which denied the Petitioner's claim in whole, but made no reference to the value of the claim or the basis upon which the Commission would determine valuation in the event of a subsequent allowance of the claim. The Petitioner duly presented objections, assigned errors and demanded a hearing for the purpose of taking evidence upon the errors assigned which concerned the validity of the claim only. (R. 31-32) The Commission granted the petitioner's request and the hearing was set for December 22, 1954. The Commission's notice of hearing contained no reference to valuation whatsoever. (R. 33)

At the opening of the hearing the Petitioner was advised that although no finding whatsoever had been

made by the Commission with respect to valuation of the claim, a memorandum on valuation had been furnished to the Commission by an employee of the Securities and Exchange Commission hired by the Commission as an expert appraiser, which indicated that if any award were made it should be merely nominal and that, accordingly, Petitioner should, at the hearing, present evidence on the subject of the valuation. (R. 36-37)

Petitioner's counsel pointed out that since the Proposed Decision only involved the validity of the claim, and that he had not been informed of the value of the claim as determined by the Commission, or the basis for that determination, he was ready to proceed only on "the questions raised by the Proposed Decision", in accordance with the Commission's Rules of Practice. (R. 40-41) Counsel demanded a further hearing on the issue of valuation if the Commission should reverse the Proposed Decision and issue an award for less than the full amount claimed. (R. 41-42) He requested that he be advised of the manner in which the Commission would arrive at the determination that the claim only had a nominal value, the evidence upon which that determination would be based, and the legal contentions in support thereof. (R. 37) The Hearing Examiner stated that such request was in the record and would be considered by the Commission, and that it was not his responsibility to make the decision. (R. 42)

The Commission's memorandum or its contents has never been made available to the Petitioner, under a claim of privilege by the Commission that it is a so-called intra office memorandum. (R. 56, 104)

The day before the Commission was to complete its affairs with respect to the Yugoslav claims, the Com-

mission denied Petitioner's request for the hearing on valuation (R. 66), and issued its Final Decision on Petitioner's claim in which the Commission reversed the Proposed Decision almost in its entirety, acknowledged the validity of the Petitioner's claim, and stated for the first time that the value of said claim amounted to only $12,300, approximately 1% of the amount claimed. (R. 58-65) The Commission has at all times failed and refused to grant appellant the hearing to which he is entitled under the Act despite repeated requests therefor. (R. 5, 79, 81-86)

The Petitioner brought this action to require the Commission to grant the hearing which the Act and the Commission's Rules of Practice require as a matter of right to a claimant whose claim has been allowed for less than the full amount claimed, and for other relief. (R. 5-8)

On March 8, 1955, the respondents moved to dismiss the complaint "upon the ground that the defendants were without jurisdiction to perform the acts sought to be compelled by the plaintiff", relying upon Section 6 of the Act. The motion was denied; a motion for reconsideration was likewise denied. (R. 79, 90-91)

In May, 1955, the respondents answered the complaint. (R. 9-11) On June 6, 1955, the Petitioner took the deposition of Commissioner Henry J. Clay, one of the respondents. (R. 104-106)

In July, 1955, the Petitioner made an application for a temporary injunction restraining the respondent, the Secretary of the Treasury, from making payments out of the Yugoslav Claims Fund which would reduce the total amount in such fund below the amount

claimed by the respondent; namely, $1,538,853.52. Since the Court below granted such an injunction in *deVegvar* v. *Gillilland* (1955), 97 U.S. App. D.C. 126, 228 F. 2d 640, cert. den., 350 U.S. 994, pending the hearing of the appeal, a stipulation was entered into to maintain the status quo until after the disposition of the *deVegvar* appeal. (R. 88, 92-94)

After the decision of the Court below in the *deVegvar* case and the denial of certiorari in that case by this Court, the respondents on April 30, 1956, filed a motion to dismiss or, in the alternative, for summary judgment, even though the case had been set down for a pre-trial hearing. (R. 12) All pending proceedings were, in effect, consolidated by the District Court at a hearing held on May 23, 1956; namely, Petitioner's motion for a temporary injunction, the pre-trial hearing, and the respondents' motion to dismiss or, in the alternative, for summary judgment. (R. 88) During the course of that hearing, since the truth of all the matters set forth in the affidavit of James E. Hughes was conceded for the purpose of this motion, the Petitioner made a cross-motion for summary judgment. The motion and cross-motion for summary judgment were then argued. (R. 100)

On May 25, 1956, the District Court granted the respondents' motion for summary judgment on the stated ground that this case is controlled by the decision in the *deVegvar* case. (R. 101-102)

The Petitioner noted an appeal from this judgment. (R. 103) The appeal was argued on March 28, 1957, and the judgment of the District Court was affirmed by the Court of Appeals on June 27, 1957, Judge Wilbur K. Miller, dissenting. (App. 1a-11a)

REASONS FOR GRANTING THE WRIT

I

A. The Court below decided a federal question—whether the right to a hearing means a full and fair hearing, or simply an opportunity to be heard—in conflict with applicable decisions of this Court.

Section 4(h) of the Act provides two grounds upon which it is mandatory that the Commission grant a hearing if so requested by a claimant: (1) if the claim is denied in whole, and (2) if the claim is allowed in an amount less than the full amount claimed.

The Commission denied Petitioner's claim in whole by its Proposed Decision of November 26, 1954. (R. 13-30) Petitioner filed objections to the denial, assigned errors, and requested a hearing on the sole issue of the Proposed Decision; namely, the denial of the validity of the claim. A hearing was granted and held on December 22, 1954. At that hearing the hearing examiner advised the Petitioner that although there had been no finding with respect to the value of its claim, there was a memorandum on value in the file which indicated that if any award were made it would be nominal. This memorandum had been furnished to the Commission by an appraisal expert of the Securities and Exchange Commission who had been hired by the Commission.

Petitioner requested the contents of the expert's memorandum. This was refused. Petitioner requested to know the manner in which the Commission would arrive at the determination that the claim only had a nominal value. This was refused. Petitioner then told the hearing examiner that since it was unaware of the value placed on its claim by the Commission or the basis upon which that value had been determined, it

would be impossible to present any rebuttal evidence on value, and that in light of the fact that the sole purpose of this hearing was to discuss the validity of the claim, it was only prepared at this time to discuss that issue. Petitioner then requested a hearing on the issue of value in the event the Commission should reverse itself on the issue of the validity of the claim.

On December 30, 1954, the day before the Commission was to complete its affairs with respect to the Yugoslav claim, the Commission issued its final decision in Petitioner's claim in which it reversed itself on the issue of the validity of the claim and allowed an award for approximately one percent of the amount claimed. On this same day, the Commission denied the Petitioner the requested hearing on valuation.

The meaning and the scope of a statutory hearing has been defined by this Court to embrace:

> ". . . Not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding . . . are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.
>
> "No such reasonable opportunity was accorded appellants. The administrative proceeding was initiated by a notice of inquiry . . . No specific complaint was formulated and, in a proceeding thus begun . . . none was required . . . In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument.

> Nor did the oral argument reveal these claims in any appropriate manner . . . The oral argument was of the sort which might serve as a preface to a discussion of definite points in a brief, but the Government did not submit a brief. And the appellants had no further information of the Government's concrete claims until they were served with the Secretary's order.
>
> "Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essense of due process in a proceeding of a judicial nature . . ." *Morgan* v. *United States* (1938), 304 U.S. 1, 18-19.

See *Simmons* v. *United States* (1955), 348 U.S. 397; *Jay* v. *Boyd* (1956), 351 U.S. 345 (dissenting opinions of Mr. Chief Justice Warren, Mr. Justice Frankfurter, Mr. Justice Douglas, and Mr. Justice Black); and *United States* v. *Storer Broadcasting Company* (1956), 351 U.S. 192.

This Court has also held that where an administrative body uses a memorandum as a possible basis for its decision, the person affected has a right to know and meet the contents of the memorandum:

> ". . . [W]e believe it also to be implicit in the Act and Regulations—viewed against our underlying concepts of procedural regularity and basic fair play—that a copy of the recommendation of the Department be furnished the registrant at the time it is forwarded to the Appeal Board and that he be afforded an opportunity to reply." *Gonzales* v. *United States* (1955), 348 U.S. 407, 412.

Further, that where the testimony of an expert is relied upon in reaching a decision, the person affected

has been denied due process if there has not been a sufficient opportunity to cross-examine said expert:

> "It certainly is illogical if not actually unfair to permit witnesses to give expert opinions based on book knowledge and then deprive the party challenging such evidence of an opportunity to interrogate them about divergent opinions expressed in other reputable books." *Reilly* v. *Pinkus* (1949), 338 U.S. 269, 275.

In a decision in a case containing a situation very similar to the instant case, this Court held that there had effectively been a denial of a hearing before the Commission in question:

> "The Commission had given notice that the value of the property would be fixed as of a date certain. Evidence directed to the value at that time had been laid before the triers of the facts in thousands of printed pages. To make the picture more complete, evidence had been given as to the value at cost of additions and retirements. Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial." *Ohio Bell Telephone*

Company v. *Public Utilities Commission of Ohio* (1937), 301 U.S. 292, 300.

The Court below, in conflict with the foregoing rulings of this Court, decided:

> "... [D]ue process in these circumstances surely does not require more than an opportunity for the claimant to be heard. ..." (App. 5a)

and that the requirements of due process in these circumstances were satisfied if only "some minimal form of hearing" is had. (App. 5a)

Thus the Court, notwithstanding the Commission's admitted refusal to grant a hearing on the issue of value, held that the Petitioner had received all to which it was entitled under the Act since it had been given the opportunity to present evidence on the question of value at the only hearing granted Petitioner, the hearing confined to the question of the validity of the claim. Completely ignored is the fact that Petitioner had no knowledge of the value placed on its claim by the Commission, had no knowledge of the basis upon which the Commission intended to determine value, and had no knowledge of the contents of a memorandum of an expert on appraisal. Further, for the first time in the processing of this claim, the Petitioner was advised in the Commission's final decision that there were several appraisals with respect to Petitioner's property in the possession of the Commission; namely, the Government of Yugoslavia's $315,576.92; the Commission's field office, $727,272.72; and Petitioner's, $1,538,753.52.

The Court also attempted to distinguish this Commission from other kinds of administrative bodies to

which the due process hearing requirements of this Court apply, in an effort to support its holding that the hearing provided Petitioner was an adequate and fair one. That this distinction is in conflict with the decisions of this Court is clear. Regardless of whether the case be criminal, immigration, labor, securities, etc. it has been consistently held by this Court that the hearing provided for by a statute must be a fair hearing in order to meet the requirements of due process.

The Commission is an administrative agency exercising quasi-judicial powers. It, like other administrative bodies, was created by an act of Congress and derives its entire power, authority and jurisdiction from that act. There is no basis in the Act or in the decision of this Court to warrant the arbitrary conclusion of the Court below that this Commission is distinguishable from other kinds of administrative bodies.

In addition to contravening the holdings of this Court as to what constitutes a hearing, the Court below refused to accept the plain admonition of Congress in the Act that in conducting its hearings, the Commission "shall comply with the provisions of the Administrative Procedure Act of 1946 except as otherwise specifically provided by this chapter". (22 U.S.C. 1623(j)) Since there are no specific exceptions provided in the Act with respect to a hearing, the hearing provided for in Section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006(c)) must be had if the Commission's hearing is to meet the requirements of due process:

> "... Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such

cross-examination as may be required for a full and true disclosure of the facts. . . ." (App. 12a)

The legislative history of the Act clearly indicates that Congress did not intend to leave to conjecture the question of whether or not the Administrative Procedure Act was to be applied, and made its application explicit. In House Report 770, 81st Cong., the Committee on Foreign Affairs stated: (p. 7)

> "In its procedures the Commission will operate generally under the provisions of the Administrative Procedure Act (Public Law 404, 79th Cong.). This would presumably be true under the terms of the Administrative Procedure Act itself, but the committee has amended the bill so as to make this explicit. Internal procedure will be along judicial lines. Each claim will be adjudicated on an adversary basis. Awards will be made on the basis of a record."

We submit that the hearing granted the Petitioner on the question of the validity of its claim, and at which time the Petitioner was offered an opportunity to submit evidence on the issue of value—an issue considered by the hearing examiner to be an extremely important issue in any claim (R. 39)—falls far short of anything approximating the meaning of "hearing" as defined by this Court. To be heard means to be effectively heard, and the refusal by the Commission to disclose the value it had placed on Petitioner's claim or the basis for determining that value, foreclosed that possibility.

We further submit that Congress placed no limit on the number of hearings to be held by the Commission in order for there to be a full and true disclosure of the facts. It is true that it was the desire of all par-

ties, including the Petitioner, that the determination of all claims be completed as quickly as possible. However, although the Petitioner's claim had been before the Commission for more than three years, the Proposed Decision on Petitioner's claim was issued on November 26, 1954, the hearing on the validity of its claim was heard on December 22, 1954, and the hearing on value of its claim was denied and the final decision with respect to its claim, as were hundreds of others, was issued on December 30, 1954, the day before the Commission was to complete its affairs with respect to the Yugoslav claims. It is inconceivable that Congress intended that justice and fairness be sacrificed in the name of expeditiousness.

B. The Court below also contends that because of the withdrawal of review provisions of Section 4(h) of the Act (22 U.S.C. 1623(h)):

> ". . . The action of the Commission in allowing or denying any claim under this chapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."

the courts are powerless to intervene in the affairs of the Commission, unless there is some constitutional deprivation involved:

> ". . . [I]f the agency's failure to follow prescribed procedures does not result in the denial of a constitutional right, there is no constitutional reason for seeking to narrow the scope of a non-reviewability statute. . . ." (R. 4-5)

It is well settled in this Court that courts have the power to judicially intervene to keep an administra-

tive body within its statutory authority regardless of whether or not a constitutional issue exists. In *Peters* v. *Hobby* (1955), 349 U.S. 331, this Court refused to examine the constitutional issue and held:

> "... We find, however, that the case can be decided without reaching the constitutional issues ... We conclude that the Loyalty Board's action was so patently in violation of the Executive Order—in fact, beyond the Board's delegated jurisdiction under the Order—that the constitutionality of the Order itself does not come into issue." (p. 338)

> "Agencies, whether created by statute or executive order, must, of course, be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority." (p. 345)

Reversing the order of an administrative tribunal on the ground that the petitioner had been deprived of the fair hearing required by the act, this Court stated in *Simmons* v. *United States, supra*:

> "We are not now dealing with constitutional limitations. We are endeavoring to apply a procedure set forth by Congress, in accordance with the statutory plan and the concepts of basic fairness which underlie all our legislation." (p. 405)

Where the decision of the administrative body has been made final, this Court held in *Estep* v. *United States* (1945), 327 U.S. 114:

> "The provision making the decisions of the Local boards 'final', means ... that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justi-

> fied. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. . . ." (p. 122)

Justice Brandeis, in his dissenting opinion in *Crowell* v. *Benson* (1932), 285 U.S. 22, most ably noted the role of the courts in examining the decisions of administrative bodies:

> "With respect to them, [administrative bodies] the function of the courts is not one of review but essentially of control—the function of keeping them within their statutory authority." (p. 89)

See *Stark* v. *Wickard* (1943), 321 U.S. 288.

The Court below refused to recognize the distinction established in the foregoing cases between reviewing the merits of an administrative ruling and judicial intervention to keep an administrative body within the limits of the statute creating that body, and insisted upon designating the relief sought by Petitioner as "judicial review". Obviously judicial review is barred by Sec. 4(h) of the Act; but this provision was never intended by the Congress to apply where the Commission violated and ignored the mandate of the Congress. As Judge Wilbur K. Miller stated in his dissenting opinion:

> ". . . The right to a hearing is a valuable right conferred by the statute and deprivation of it is *per se* prejudicial. I cannot agree that the Commission may with impunity nullify the legislative requirement that it grant a hearing. Members of the Congress which enacted this legislation will be surprised, I imagine, to learn from the majority opinion that the Commission cannot be compelled to grant the hearing which they ordered it to afford. I cannot believe it was the legislative in-

> tent in enacting this statute to immunize unlawful administrative action from correction by the courts. Nor do I believe that in any case, no matter how strongly it may word a provision for immunity from judicial review, Congress can prevent a court of competent jurisdiction from compelling an administrative agency to proceed as required by its governing statute. Nor is there any reason apparent to me why Congress should desire to do so, for in the absence of such judicial power there is no protection against administrative abuse such as occurred in this case, and a wrong can be perpetrated for which there is no remedy." (App. 10a)

Judge Miller's dissenting comment requires no elaboration to point up the dangers manifest in the decision of the Court below.

We submit that the holding of the Court below is in direct conflict with the well established doctrine of this Court that administrative bodies shall be required by the courts to stay within the confines of the acts creating them, attempted judicial withdrawals notwithstanding. As was stated by this Court in *Garfield* v. *Goldsby* (1908), 211 U.S. 249, 262:

> ". . . [T]here is no place in our constitutional system for the exercise of arbitrary power . . ."

II

In its decision of June 27, 1957, the Court below decided a question of general importance that has not been decided by this Court—the nature of the Yugoslav Claims Fund and the rights of claimants under this type of agreement in that Fund. This question should be settled by this Court.

The Commission, pursuant to the authority granted under Public Law 285, 84th Congress (69 Stat. 562, et seq.), is presently examining claims for property losses suffered by United States nationals in Bulgaria, Hungary, Romania, Russia, and Italy, and negotiations are now being carried on by the Department of State with respect to claims of United States nationals against other countries. It is expected that future agreements entered into by the United States shall be similar to the United States—Yugoslav agreement of 1948. An exceedingly large number of persons have already been and will be affected by the decisions of the Commission (the Yugoslav claims alone involved more than 1,500 persons). The amount of money that will be dispensed by the Commission pursuant to these agreements totals in the hundreds of millions of dollars.

In view of the conflict between the position taken by Congress, as shown by the legislative history of the Act here under consideration, and that taken by the Commission, as spelled out in the decision of the Court below, there is an important and urgent need for a decision by this Court as to the nature of the funds provided by this type of agreement and as to what rights, if any, claimants have thereunder.

Under the settlement agreement between the United States and Yugoslavia, the money paid into the Treasury of the United States by Yugoslavia is to be distributed by the United States among the claimants (Article 1(a)), and any balance remaining after adjudication of all claims is to be returned to Yugoslavia (Article (1)(c)). All cost of adjudication is to be charged against the claimants. (Id.)

It is clear that this money was not paid to the United States as a nation, that it never became United States money, and that the United States agreed to act only as the trustee of this fund for the benefit of all claimants. This contention was emphasized, acknowledged and agreed to by both Houses of Congress throughout the legislative history of the implementing Act.

In Senate Report 800, 81st Cong., Senator Green, stated (pp. 3-4):

> ". . . This sum has been deposited and covered into the Treasury Department as a trust fund to be paid out to the respective claimants under the aforesaid agreement . . .
>
> ". . . The intent of the Agreement and the bill is to provide compensation for eligible American property interests nationalized or otherwise taken by the Government of Yugoslavia. . . .
>
> ". . . Yugoslavia has a reverter interest if the total valid claims are less than the sum of $17,000,000. . . ."

On the House side, Congressman Ribicoff, the author of the bill, stated in H. Rept. 770, 81st Cong. (p. 2):

> ". . . The bill would provide a procedure and a mechanism whereby the money received by the United States in pursuance of the agreement can be apportioned among the claimants. . . ."

The House floor debate is replete with references to the trust nature of this Fund. That this is the money of the claimants and Yugoslavia, and not of the United States, and that the United States is only to act as the trustee of the money, is made unequivocally clear in the colloquy between Rep. Beckworth and Rep. Ribicoff (95 Cong. Rec. 8837):

"Mr. Beckworth: Who has title to this money?

Mr. Ribicoff: The United States holds this money as Trustee, under the settlement of July 18, 1948, between the executive branch of our Government, acting by the Secretary of State, Mr. Marshall, and the Government of Yugoslavia. The $17,000,000 was paid to the United States Treasury in trust for the claimants of the United States. It does not belong to the United States.

Mr. Beckworth: Do you mean the United States Government does not have title to the money?

Mr. Ribicoff: No; it does not have title. It cannot utilize that money for the general purposes of the Nation.

* * * * *

Mr. Ribicoff: We must not forget the character of the funds out of which the individual awards are to be made. It is not a fund owned by this Government. There is no public title to it. . . . The United States, in effect, holds these funds in escrow. Another way is to say that it is, for the period pending the payment of all awards, trustee for all claimants, including itself, and for Yugoslavia as well, for the residual funds will go back to Yugoslavia. The funds are not a prize over the sharing of which sundry American claimants will contest with each other or against the United States. Residual title to the fund belongs to Yugoslavia. It will get the balance, if there is a balance, after all awards are paid. Essentially the individual claims will still lie against Yugoslavia. This is different from a mixed claims settlement, in this respect only in that Yugoslavia has posted the money in advance and has authorized the United States by its own devices to determine liability in individual cases." (95 Cong. Rec. 8841).

(See also 95 Cong. 8846, 8854 8855, 8979, 8980).

In the light of the clear intention of the parties to the Agreement, and of the Congress, the Yugoslav Claims Fund is a trust fund, and the United States is its trustee for the benefit of all claimants. The seized property of the claimants was in effect converted into this money by this Agreement and paid by Yugoslavia into the United States Treasury, only as a deposit.

This Court has had occasion to consider agreements under which the United States assumed the obligation of satisfying the claims of its citizens against a foreign power, and appropriated the money necessary to pay such claims. *Blagge* v. *Balch* (1896) 162 U.S. 439. And agreements under which a foreign power paid a lump sum to the United States as a nation for injuries caused its citizens. *Comegys* v. *Vasse* (1828) 26 U.S. 193 and *Williams* v. *Heard* (1891) 140 U.S. 529. But this Court has not been called upon to consider agreements wherein the United States has accepted money only as a trustee.

The Court below completely disregarded the legislative history of the Act, the provisions of the agreement itself and concluded that: "the Foreign Claims Settlement Commission . . . has the duty of distributing a Governmentally-created fund among a class. No claimant, including the appellant, has a right to participate in any amount until the Commission has made an award. In short, a benefit is being conferred. . . ." The Court cited no authority to support its conclusionary statement, but relied solely on its prior pronouncement in *deVegvar* v. *Gillilland, supra.* We submit that the *deVegvar* case is not controlling of the issues in this case since there no attempt was made to assert

a statutory right, the denial of which constitutes a violation of due process.

In light of the present and future activities of the Commission, there is a pressing need for this Court to define the nature and character of the Yugoslav Claims Fund and the rights of claimants therein.

III

The International Claims Settlement Act of 1949, as amended, is an extremely important Federal law since it establishes a commission to render decisions which are final and conclusive upon all questions of fact and law. This Commission, though a domestic agency, by its decisions, has had and will have a tremendous impact on international law. Its activities must necessarily involve the application of international law and are considered decisions of an international tribunal. As stated by Commissioner Henry J. Clay, one of the respondents herein, in testifying before the House Foreign Affairs Committee on the legislation which eventually became Public Law 285, 84th Congress: (p. 42)

> "... You must remember that the eyes of many other countries are on this Commission from a point of view of legal precedent. We have imposed on us the duty of—well, it is beyond, it would seem, in some cases a greater duty then would be imposed on any ordinarily constituted court of law to make findings of fact and conclusions of law that are final and binding. It is a tremendous responsibility."

Later in the same testimony, Mr. Clay stated: (p. 82)

> "... We make our findings of fact and conclusions of law in our awards. They are final and

binding. They are not reviewable by any court of law. We feel we have more than just an administrative responsibility. We are, in effect, creating international law for a similar type tribunal in other countries."

It is quite evident that the decisions of the Commission are the subject of widespread interest and careful analysis by foreign international law experts.

However, the scope of this Commission's authority has yet to be defined by this Court. The respondents argue that because Sec. 4(h) of the Act provides that the decisions of the Commission shall be final and not subject to judicial review, the Commission is empowered to proceed to the determination of the validity and amount of a claim in any manner it chooses, even in complete disregard of the standards prescribed by Congress in the Act, and that no court of this country can do anything about it.

We submit that if the Commission is permitted to continue to make decisions without any court control over whether or not it has exceeded its statutory authority, the arbitrary and capricious deprivation of a claimant's statutory right to a hearing may become the rule rather than the exception in the processing of present and future claims settlements. Further, the use of such decisions as *stare decisis* by international and foreign tribunals, and the possible serious injury to many future American litigants before such bodies, as well as the injury to the reputation of the administration of justice in the United States, cannot be minimized.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

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GEORGE JOVANOVICH

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,447

AMERICAN AND EUROPEAN AGENCIES, INC., A New York Corporation, APPELLANT,

v.

WHITNEY GILLILLAND, ET AL., constituting the Foreign Claims Settlement Commission of the United States, and GEORGE M. HUMPHREY, as Secretary of the Treasury, APPELLEES.

Appeal from the United States District Court for the District of Columbia

Decided June 27, 1957

Mr. James E. Hughes, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Mr. Percy A. Shay* was on the brief, for appellant.

Mr. B. Jenkins Middleton, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, and *Samuel D. Slade*, Attorney, Department of Justice, were on the brief, for appellees. *Mr. Lewis Carroll*, Assistant United States Attorney, also entered an appearance for appellees.

Messrs. Philip Levy and *Paul M. Rhodes* filed a brief on behalf of Steven Ausnit, et al., as Amici Curiae urging affirmance.

Before EDGERTON, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* The complaint in this case is essentially similar to that in *de Vegvar* v. *Gillilland*, 97 U.S.App.D.C. 126, 228 F.2d 640 (1955), cert. denied, 350 U.S. 994 (1956), and concludes with a prayer that the Foreign Claims Settlement Commission's award to the plaintiff (which was much smaller than desired) be set aside as "null and void," and the case be returned for further hearing. The District Court granted the Government's motion for summary judgment, on the authority of *de Vegvar*.

Plaintiff-appellant contends that it did not have the hearing referred to in Section 4(h) of the governing Act,[1] which provides in part:

> "Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim."

Appellees urge that in fact appellant had an adequate hearing with respect to its claim, including the issue of the value of the claim, citing portions of the record before us in support of this contention. This is the sort of controversy which the courts are accustomed to decide. But here the very section appellant relies on also contains the following restriction on judicial review, which we considered and held controlling in *de Vegvar*:

> "The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other

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[1] International Claims Settlement Act of 1949, 64 STAT. 13, 22 U.S.C. §§ 1622-27 (1952).

official, department, agency, or establishment of the United States or by any court by mandamus or otherwise." (Section 4(h))

Appellant, seeking to distinguish *de Vegvar*, urges that the broad bar to judicial review contained in the passage just quoted was not intended to be read literally, but was to be limited to Commission action taken pursuant to prescribed procedures and then only to questions relating to the merits of a claim. Such a construction is not supported by the legislative history. While it is true that one statement by the principal proponent of the bill in the House, Congressman Ribicoff, referred to non-reviewability as relating to "the merits of claims,"[2] consideration of the entire legislative history plainly indicates that Congress did not intend to enact a mere partial barrier to review: the courts were told that they had no role to play when the Commission acted to allow or disallow a claim. As a matter of fact, it was the view of Congressman Ribicoff that the Constitution did not allow judicial review of such matters. He made it clear that "The settlement of these claims is strictly within the executive branch of our Government," and added his belief that "three United States Commissioners would administer justice."[3]

But appellant contends that we must modify the limitation on judicial review in Section 4(h) on the assumption that Congress would not establish procedures for an agency without authorizing the judiciary to enforce compliance. Appellant relies on the numerous cases where, in the absence of clear congressional directions to the contrary, the courts review agency action to insure compliance with prescribed procedures. *E.g.*, *Stark* v. *Wickard*,

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[2] 95 Cong. Rec. 8840 (1949).

[3] 95 Cong. Rec. 8854 (1949).

321 U.S. 288 (1944). But the fact that the courts do so in proper cases when Congress has not legislated to the contrary affords no reason for watering down an express congressional statement that there shall not be review. The assumption that Congress must always contemplate judicial correction of erroneous agency action seems to have its basis in the view that Congress lacks other means to enforce its statutory mandates. But this is not so: Congress can, if it wishes, amend the law, allow a claim through a special bill, permit suit in the Court of Claims, or make a special appropriation; certainly it always has power to investigate and to impeach. When Congress tells the courts that there shall not be review, we will not assume, in the absence of something more, that Congress could not have meant what it said. Especially is this true in a case such as this where considerations of speed in the distribution of a fund provide a sound basis for Congress' choice of procedure.

The other contention urged to support a restrictive reading of Section 4(h) is essentially a constitutional argument: Congress may not prevent a court from requiring agency compliance with statutory procedures. If the agency's failure to follow prescribed procedures resulted in the denial of a constitutional right, the validity of a blanket non-reviewability clause would indeed pose a grave and difficult constitutional question.[4] On the other hand, if the agency's failure to follow pre-

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[4] *Compare* Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868), *with* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-29 (1816); and see Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 HARV. L. REV. 1362 (1953). It may well be that if the denial of a constitutional right were persuasively alleged, the courts would seek a construction of the non-reviewability statute which would allow review of such questions, thereby obviating consideration of the more fundamental constitutional question. In *de Vegvar*, we assumed for purposes of argument that Section 4(h) would not bar review of assertions that equal protection of the laws had been denied.

scribed procedures does not result in the denial of a constitutional right, there is no constitutional reason for seeking to narrow the scope of a non-reviewability statute.

In this case, appellant alleges that the Commission denied it the kind of hearing to which it was entitled under the Act. We will assume for present purposes that we have jurisdiction to consider whether the hearing afforded appellant was below the standard of due process of law. Appellant concedes that it was accorded a hearing in which it had opportunity to present its views and to offer evidence to support the merits and proper valuation of its claim. Its assertion is that the constitutional right to a hearing includes the right to know and meet the claims of the opposing party, citing *Morgan* v. *United States*, 304 U.S. 1 (1938), and *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937), and that here it was not furnished a staff memorandum on which the Commission relied in making its determination of value. It says that the Commission should have accorded it a further hearing wherein it could offer evidence designed to rebut the conclusions of the memorandum. The cited cases established the requirements of a fair hearing in situations where a governmental agency was affirmatively acting to the detriment of the complaining party by fixing maximum rates (*Morgan*) or by lowering rates and ordering the complainant to make refunds (*Ohio Bell Telephone*). The Foreign Claims Settlement Commission is not engaged in that kind of task; rather it has the duty of distributing a governmentally-created fund among a class. No claimant, including the appellant, has a right to participate in any amount until the Commission has made an award. In short, a benefit is being conferred, and while it is perhaps true that some minimal form of hearing is necessary even for the performance of such a governmental function, due process in these circumstances surely does not require more than an opportunity for the claimant to be heard. Appellant

concedes it was accorded this much. On the showing here we are not required to decide whether Section 4(h) should be narrowly construed to permit review of the validity of a deprivation of a constitutional right.

We conclude, therefore, that the statutory bar, as interpreted in *de Vegvar, supra,* and in *Dayton* v. *Gilliland*, —— U.S.App.D.C. ——, 242 F.2d 227 (1957), precludes us from granting the type of relief appellant now requests. See also *Haas* v. *Humphrey*, —— U.S.App.D.C. ——, —— F.2d —— (decided May 16, 1957). The Commission has taken final action allowing appellant's claim (though for a smaller amount than requested), and this is "conclusive on all questions of law and fact" under Section 4(h). The question whether, in obtaining an award of a part of the governmentally created fund, appellant received the type of hearing provided by the statute is one of the "questions of law" not subject to judicial review under the provisions of Section 4(h). It is essentially similar to the questions presented in *de Vegvar*, where the claimant said that the Commission had not obeyed the requirements of the governing statute in various procedural and substantive respects. See 97 U.S. App.D.C. at 127, 228 F.2d at 641. Here, as in *de Vegvar*, the statute would be disregarded if we set aside the Commission's action and ordered reconsideration, whether we did so on the merits or to correct alleged procedural defects.

The judgment of the District Court will accordingly be

Affirmed.

WILBUR K. MILLER, *Circuit Judge*, dissenting: The principal question presented here is this: when the Commission has denied to a claimant the hearing concerning his claim to which he is entitled by statute, may a court of competent jurisdiction require it to grant a hearing, or is such judicial coercion precluded by the statutory provision that the Commission's action in allowing or

denying a claim shall not be subject to review by any court?

If the court has power to force compliance with the congressional command that a hearing be held before final administrative decision, another question may, and in this case would, arise: does the finality provision prevent the courts from deciding the preliminary issue raised by a claimant's contention that it was denied the hearing to which it was entitled under the statute, and the Commission's contention that a hearing was in fact afforded? In other words, the second question is whether the Commission's disputed conclusion that its procedure amounted to a hearing is immune from judicial scrutiny. These questions were not raised in *de Vegvar* v. *Gilliland*, 97 U.S.App.D.C. 126, 228 F. (2d) 640 (1955), and are before us for the first time.

My brothers of the majority do not reach the second question because they hold the statute forbids judicial correction of the Commission's refusal to grant a statutorily-required hearing, unless the refusal impinges on some constitutional right of the claimant. With respect to that, the majority do not perceive any constitutional issue. Thus their holding is that the agency here involved may disobey a clear congressional directive to grant a hearing, without being called to account by the courts; that it cannot be judicially required to act within the framework of its statutory authority. This seems to me to be dangerous doctrine and I cannot concur in it. It springs from an erroneous interpretation of the finality provision in the statute and from a mistaken conception of the relief which this appellant seeks, as discussion will demonstrate.

Section 4(h) of the Act provides that "Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled . . . to a hearing . . . with respect to such claim." It is not disputed